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No.

In the

Supreme Court of the United States

In the Matter

of

EDWARD GADSON, RICHARD KATWARU, KHEMWATIE RAMNAUTH, LISA SIMONELLI and VICTORIA GOVERNALI,

Petitioners,

versus

SUSAN WALKER, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION, ALPHA THERAPEUTIC CORPORATION AND ARMOUR PHARMACEUTICAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mass tort class action certification is *res judicata* as to absent class members, so that in their direct appeal of a district court's anti-suit injunction order terminating their ongoing state court actions as authorized by the All Writs Act, the absent class members are denied the opportunity to be heard on their due process collateral attack against the final judgment that improperly certified a settlement-only class that had previously been decertified as a litigation class.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were:

Petitioners Edward Gadson, Richard Katwaru, Khemwatie Ramnauth, Lisa Simonelli, and Victoria Governali, and Respondents Susan Walker, Rhone-Poulenc-Rorer, Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Company, and Alpha Therapeutic Corporation.

The following Respondents have corporate affiliations to be listed under Rule 29.6:

(A) Rhone-Poulenc Rorer, Inc.'s parent is Rhone-Poulenc S.A. No publicly held companies own 10% or more of the stock of Rhone-Poulenc Rorer Inc., except its parent Rhone-Poulenc S.A.

(B) Armour Pharmaceutical Company's parent is Rhone-Poulenc Rorer International (Holdings) Inc. No publicly held companies own 10% or more of the stock of Armour Pharmaceutical Company. Rhone-Poulenc Rorer, Inc., which owns 100% of the stock in Armour Pharmaceutical Company's parent Rhone-Poulenc Rorer International (Holdings) Inc., has issued shares of stock to the public.

(C) Bayer Corporation's parent is Bayer A.G., which owns 100% of the stock of Bayer Corporation.

(D) Baxter Healthcare Corporation's parent is Baxter International, Inc., which owns 100% of the stock of Baxter Healthcare Corporation.

(E) Alpha Therapeutic Corporation's parent is Green Cross Corporation of America, which owns 100% of the stock of Alpha Therapeutic Corporation.

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I

PETITION FOR WRIT OF CERTIORARI

Petitioners Edward Gadson, Richard Katwaru, Khemwatie Ramnauth, Lisa Simonelli and Victoria Governali respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 15, 2000.

Opinions Below

The November 15, 2000 Decision of the United States Court of Appeals for the Seventh Circuit affirming the anti-suit injunction is reported at 2000 U.S. App. LEXIS 29384 (Nov. 15, 2000), and is reprinted in the Appendix hereto, pp. 1a-3a, *infra*.

The February 2, 2000, order of the MDL court issuing an anti-suit Injunction Order barring these state court plaintiffs from any further prosecution of their personal injury actions pending in New York State Supreme Court is not reported, but is reprinted in the Appendix hereto, pp. 7a-8a, *infra*.

The April 16, 1999 order of the MDL court amending the March 3, 1999 Injunction Order is not reported, and is reprinted in the Appendix hereto, pp. 9a-10a, *infra*.

The March 3, 1999 order of the MDL court denying the Rule 60 motions of certain other members of the settlement class is not reported, and is reprinted in the Appendix hereto, pp. 11a-16a, *infra*.

The March 3, 1999 Injunction Order of the MDL court is not reported, and is reprinted in the Appendix hereto, pp. 17a-18a, *infra*.

The March 3, 1999 Memorandum Opinion of the MDL court on the fractionator defendants' motion to enjoin certain class members from litigating duplicative lawsuits is not reported, and is reprinted in the Appendix hereto, pp. 19a-24a, *infra*.

The decision of the Seventh Circuit denying a petition for writ of mandamus to other class members is reported at In re Factor VIII or IX Concentrate Blood Products Lit., 159 F.3d 1016 (7th Cir. 1998), and is reprinted in the appendix hereto, pp. 25a-32a, *infra*.

The May 15, 1997 Order of the MDL court concerning requests for late opt-outs is not reported, and is reprinted in the Appendix hereto, pp. 33a-34a, *infra*.

The May 8, 1997 final judgment of the MDL court approving certification of the "settlement-only" class action is not reported, and is reprinted in the Appendix hereto, pp. 35a-51a, *infra*.

The August 14, 1996, order of the MDL court preliminarily approving a "settlement-only class" action under the caption Susan Walker v. Bayer Corporation, et al., No. 96-CV-5024 (N.D.Ill.E.D.), is not reported, and is reprinted in the Appendix hereto, pp. 69a-77a, *infra*.

The order of the Seventh Circuit granting the fractionators' petition for a writ of mandamus decertifying the litigation class, is reported at *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. den.*, 116 S. Ct. 184 (1995).

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was decided and entered November 15, 2000. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Statutes Involved

UNITED STATES CONSTITUTION:
Fifth Amendment: reprinted in appendix hereto, p. 83a
Federal Rules of Civil Procedure Rule 23: reprinted in appendix hereto, pp. 78a-82a

Statement of the Case

The petitioners at bar are state court plaintiffs with personal injury claims stemming from exposure to contaminated factor concentrate blood products who were enjoined from further prosecuting their actions by the issuance of an anti-suit injunction order of a district court presiding over multidistrict litigation proceedings based on a "settlement-only" class action it had previously certified. There has never been an examination as to whether the settlement-only class was properly or improperly certified under subdivisions (a) and (b) of Rule 23. Although appeals were noticed, no direct appeal of the class certification was prosecuted. The only review thus far has been through collateral attack by way of petitions for mandamus by other class members which were denied without examining the class certification under Rule 23 criteria, although in the course of deciding the mandamus petitions, the Seventh Circuit has described the factor concentrate class settlement as "weird" and "questionable," references to the fact that it established a uniform $100,000 payment to each eligible class member.

Significantly, however, while the Rule 23 propriety of the settlement class certification has not been directly or indirectly reviewed, it clearly suffered the preclusive effects of a prior decision of the Seventh Circuit itself that had decertified a *litigation* class involving these same class members and claims against the same settling defendants. Indeed, this decertification occurred as a result of a mandamus petition by the defendants, in the course of which the Seventh Circuit ruled in their favor that a litigation class could not be certified because it did not meet the predominance and superiority requirements of Rule 23. Thus, it becomes clear the district court later turned around and certified this *settlement* class as a Rule 23 action, even though the Seventh Circuit had previously decertified a *litigation* class comprised of the identical class members with

the same claims on the grounds the class did not meet the requirements of Rule 23(a) and (b).

Petitioners are absent class members who had not personally participated in any capacity in the settlement-only class certification proceedings, and had neither opted in nor out of the class settlement within the 45-day period set forth in the class notice. At the time the anti-suit injunctions were issued, the petitioners at bar were pursuing state court actions that were timely under New York's discovery-of-the-injury statute of limitations, as well as a revival statute specifically allowing suits against these fractionators during a one-year window.

Petitioners sought reversal of the MDL district court's anti-suit injunctions on the due process grounds that the class action could not have been properly certified under and violated Rule 23(a), (b) and (c), and that they had inadequate representation and notice. The Seventh Circuit affirmed the anti-suit injunctions without addressing any of the petitioners' due process challenges to the class certification on the ground that:

> We acknowledged that the class action might be "questionable," 159 F.3d at 1018, but held that it was not void and could not be collaterally attacked. The appellants have given us no reason to overrule our two-year-old decision.

App. 3a. The "two-year-old decision" rejected a mandamus petition brought by other class members who had participated in or consented to the settlement by opting in before the notice deadline, and then sought to challenge expanded releases they were required to sign in exchange for the $100,000.

The Seventh Circuit's rulings in the decision for which review is sought rejects all collateral attacks against this particular settlement, and makes the absence of a class

member tantamount to participation by consent or default. On due process grounds this Court should overrule the application of preclusion principles to these petitioners and reach the constitutional issues surrounding the class certification in light of the Seventh Circuit's *sub silentio* acknowledgment that this settlement class did not meet the prerequisites of the applicable subdivisions of Rule 23. In this regard, it is respectfully submitted this petition preliminarily raises the significant, but narrower due process issue of whether or not a class certification, through the passage of time or the disposition of collateral attacks by other class members, becomes *res judicata* as to or collaterally estops other absent class members with mass tort personal injury claims from raising in their direct appeal of the anti-suit injunction order a collateral attack against the judgment that improperly certified a settlement-only class used as the basis underlying the district court's invocation of the All Writs Act. Both the district court and the Seventh Circuit here collaterally estopped these petitioners from making their own due process challenges on the basis of injunctions entered against other class members, as well as the orders and judgment provisionally and finally approving a void settlement class as to which these petitioners assert they had no legal duty to include or exclude themselves, despite the notice employed by the proponents of the class.

Petitioners submit their arguments show the likelihood for success in reversing the anti-suit injunctions for the same reasons the anti-suit injunction in Amchem was reversed, and submit an absent or future non-party should have the opportunity to challenge an improperly certified class action that did not comport with the rules that enable a federal court to interfere with an individual's right to trial of claims against a tortfeasor. Petitioners respectfully submit they will be unable to challenge the unconstitutionality of the settlement class that is the basis of the writs enjoining their state court actions unless a writ is issued by this Court, because they have been prevented from mounting a collateral

attack in response to the injunction against pursuing their state court claims.

REASONS FOR GRANTING THE WRIT

I. Petitioners Have Been Denied Their Procedural Due Process Rights As Absent Class Members to Collaterally Attack The Certification of the Settlement-only Class in a Direct Appeal of an Anti-Suit Injunction That Has Terminated Their Ongoing State Court Actions.

Petitioners submit the instant case raises issues of paramount public importance in view of the public interest in the process that is provided absent class members when a federal district court certifies an encompassing opt-out settlement-only class that usurps the individual's right to make decisions on whether and when to settle a claim for personal injuries. In seeking a writ in this Court, petitioners initially raise the issue of whether due process in the class action context provides individual absent class members the right to collaterally attack the certification of a settlement-only class on due process grounds when they are subjected to an injunction enjoining, and are open to contempt of court for, further prosecution of litigation. Petitioners address the substantive constitutional infirmities of the settlement-only class certification separately as related to determining the availability and meritorious nature of the collateral attack.

In turning directly to the preliminary due process issue, it is only necessary to note that "[t]he district court enjoined the appellants, members of a class consisting of hemophiliacs who became infected with HIV by contaminated blood solids manufactured by the defendants, from seeking to avoid the settlement of the class action by suing the defendants on the same claim in state court."/*[1]

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[1]*/The district court entered an Injunction Order on February 2, 2000, in

App. 2a. In its decision affirming the anti-suit injunction, the Seventh Circuit did not examine the class certification in any respect. Instead, it referred to these petitioners' collateral attack as "a sequel" to one of its prior published opinions/*[2] and a subsequent unpublished order/*[3] involving other class members, and ruled:

> A statement in the published opinion is dispositive of this appeal: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone **by some who, having participated in the case**, cannot complain that his rights were infringed without his knowledge." 159 F.3d at 1019.

App.2a [emphasis added]. The court went on to explain its basis for concluding that the appellants, including petitioners here, "participated in the case" as follows:

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which it incorporated in a conclusory fashion various prior orders and decisions made with respect to other claimants/litigants, including a prior order of March 3, 1999, by which the district court had denied the Rule 60 motions of other claimants who had opted into the settlement, and included the following ruling on the issue of "voidness":

> Movants argue that the order of May 8, 1997 approving the class settlement is void under the Amchem case. We rejected this argument in our order of February 18, 1998, (id. at 9-11), as did the Seventh Circuit in its mandamus ruling. We adhere to our own previous decision, and, more importantly, follow the decision of the Seventh Circuit.

App. 13a.

[2]*/ In the Matter of Rhone-Poulenc Rorer Pharmaceuticals, Inc., 159 F.3d 1016 (7th Cir. 1998).

[3]*/ Reported at 1999 U.S.App. LEXIS 26427, 1999 WL 809729 (7th Cir. Oct. 7, 1999).

> Three of the appellants are identically situated to the claimants whose appeals we rejected in our October 7, 1999 order. The other four claim not to have received notice of the proposed settlement, but the district court with ample basis rejected the claim as factually unfounded. One of these four, Gadson, further claims that he didn't know he had HIV until after the deadline for opting out of the class, which was October 15, 1996. The reason he didn't know is that, though he had every reason to believe that he had not only HIV but indeed full-blown AIDS, having had seizures as early as 1987, he delayed being tested until 1997, at which time he discovered his infection had already proceeded to the AIDS stage. This was an ostrich tactic equivalent to knowledge.

App. 2a-3a. Thus, while apparently acknowledging that the "other four" (petitioners here) had not in fact participated in the class action, the Seventh Circuit appears to rule that actual or constructive notice of the class transformed these absent unnamed class members into named participants who should have intervened and exhausted appellate remedies, since its ultimate holding was as follows:

> Without acknowledging the statement quoted above from our previous opinion, the appellants make as their major pitch the argument that they are indeed entitled to mount a collateral attack on the settlement, which they claim should not have been entered because among other things the class action was not proper under Fed.R.Civ.P. 23. We acknowledged that the class action might be "questionable," 159 F.3d at 1018, but held

> that it was not void and could not be collaterally attacked. The appellants have given us no reason to overrule our two-year-old decision.
>
> AFFIRMED.

App. 3a. Indeed, the "previous opinion" rejected another class member mandamus petition, but stated that:

> The settlement embodied in the consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor*, 138 L.Ed.2d 689, 117 S.Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case), and in its terms. That all the members of the class should receive the identical payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird.

In re Factor VIII and IX Concentrate Blood Products Litigation, etc., *supra*, 159 F.3d at 1018. The Seventh Circuit went on to rule the district court had Article III jurisdiction to approve the factor concentrate settlement-only class (*id.*, 159 F.3d at 1018), but did not address the Rule 23 criteria. In Amchem, this Court found that, "because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach [the class certification issues] first." *Id.*, 521 U.S. at 612-613, 117 S.Ct. at 2244. The Seventh Circuit called this settlement "downright weird" and "questionable", but affirmed it nonetheless, and relies on its holding in a prior appeal that "it was not void and could not be collaterally attacked." It is respectfully submitted, in affirming the judgment of the

multidistrict court certifying the class action settlement at issue here, the Seventh Circuit turned this Court's Amchem decision on its head by ignoring the holdings therein that (1) the class certification issues are dispositive, because their resolution was logically antecedent to the existence of any issues, such as justiciability or standing, arising under Article III of the Federal Constitution; and (2) while the settlement is relevant to the determination whether certification of the class is proper under Rule 23, the class must satisfy the prerequisites Rule 23 (a) and (b)*id.*

These determinations by the Seventh Circuit as to the instant petitioners' appeal are clearly intended to overcome the fact that they had not "participated in" the settlement class at all, and were future litigants at the time of the class certification and entry of the anti-suit injunctions./*[4] The above rulings evince an alarming disregard for protecting absent class members, and raise a number of concerns. One concern would be, where as here the named class representative (Susan Walker) had no incentive to appeal because it was a settlement, can the absence of a prior appeal of the final judgment certifying a class become immediately and inexorably *res judicata* as to absent class members, impervious to any due process challenge. Another concern is whether there is a point in time when a collateral attack by an absent class member is no longer timely or viable. In this

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[4]*/None of the petitioners at bar were federal or state court plaintiffs at any time prior to the provisional approval of and final judgment certifying the class settlement, and the district court had no jurisdiction over them derived from the multidistrict proceedings pending before it at that time. Petitioners' individual cases involve different brands of Factor VIII, different periods of infusion with Factor VIII, different amounts and frequencies of such infusions, different medical histories, different hospitals with varying access to infusion logs and other records identifying the Factor VIII product, different dates of HIV diagnosis, and other individualized matters. All of their state court actions were timely under New York law by virtue of its discovery-of-the-injury limitations statute, as well as a revival statute that extended the time to file suit against these fractionators to December 31, 1997.

regard, these petitioners have been told that they have no grounds to appeal the anti-suit injunction entered against them, apparently because they "participated" by default. Most disturbing, however, is the question of whether or not the certification of a settlement-only class will be able to escape review through collateral attack as to whether it was properly certified, particularly where the district court utilizes injunctive power to force the absent class member to participate in the settlement and forfeit individual litigation.

The Seventh Circuit's decision in the matter at bar is certainly discordant with its rulings in Tice v. American Airlines, 162 F.3d 966 (7thCir. 1998), where it denied an anti-suit injunction, noting, in pertinent part:

> Unless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound. There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will; indeed, the Supreme Court's recent decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), emphasizing the importance of following Rule 23's procedures for settlement classes, suggest that such an approach would be unauthorized.

Id., 162 F.3d at 972-73. The Seventh Circuit ultimately concluded in Tice that an anti-suit injunction could not lie, because the absent class members had not been adequately represented in the prior action -- the interests of the class members were too divergent to prevent a potential conflict of interest from sabotaging due process. *Id.*, 162 F.3d at 973.

Unnamed class members have standing to seek to nullify a Rule 23 judgment asserted against them on the

ground that the judgment violated due process, either because of lack of notice or because of inadequate representation, as confirmed by the fact that Amchem considered the appeal of a state court asbestos plaintiff who was diagnosed with mesothelioma in May 1994, after expiration of a class action settlement opt-out period, sued certain members of a "consortium of 20 former asbestos manufacturers" in a Maryland state court, and was "charged with civil contempt for violating the federal District Court's anti-suit injunction." Amchem, 521 U.S. at 599-600 and 605. "Absent class members may assert their due process rights `through collateral attack or otherwise.'" Zablocki v. Redhail, 434 U.S. 374, 380, n. 6, 98 S.Ct. 673, 678 n.6 (1978); *see also* Phillips Petroleum v. Shutts, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985). "Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process." Twigg v. Sears Roebuck and Co, 153 F.3d 1222, 1226 (11th Cir. 1998).

The prerequisites of Rule 23(a) and (b) are "essential to due process, because a final judgment in a class action is binding on all class members." In re: American Medical Systems, Inc.; Pfizer, Inc., 75 F.3d 1069, 1083 (6th Cir. 1996). Significantly, petitioners in the case at bar asked the Seventh Circuit to revisit the Factor Concentrate settlement-only class certification from their perspective as absent and future members in the light of that court's own prior decision in which it had decertified the same class as a *litigation* class action, Matter of Rhone-Polenc Rorer, Inc., 51 F.3d 1293, 1296-1297 (7th Cir.), *cert. den.*, 516 U.S. 867, 116 S. Ct. 184 (1995), discussed *infra*, as well as in light of this Court's decisions in Amchem and Ortiz v. Fibreboard Corporation, et al., 119 S. Ct. 2295, 144 L. Ed. 2d 715, 67 U.S.L.W. 4632 (1999). The court declined to address the same by

precluding these petitioners from raising these issues in their direct appeal of the anti-suit injunctions collaterally attacking the certification of the settlement class.

In Amchem, this Court fully explained the reasons for protecting absent class members when subdivision (b)(3) is utilized, as follows:

> In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, *10 B. C. Ind. & Com. L. Rev. 497, 497 (1969)* (hereinafter Kaplan, Prefatory Note). **Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.** See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed. 1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, *28 U.S.C. App., p. 695.*
>
> Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, *28 U.S.C. App., p. 697.* To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a)

> prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." ....

Amchem, 521 U.S. at 614-615, 117 S.Ct. at 2245-2246 [emphasis added]. "Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view", *id.*, 521 U.S. at 629 [citations omitted].

Tice confirms that the requirement of privity, usually operative in deciding claim preclusion, is only waived in a class action when the class has been "properly certified" such that no due process rights have been compromised. Amchem teaches that a class that should not have been certified under the Rules is not merely voidable, but is void, and this issue should be addressed separately from the issue of whether proper notice was given to the class members under the other provisions of the rule that are dependent upon the prerequisites in Rules 23(a) and (b). Moreover, the Seventh Circuit itself has ruled that "even after a class has been certified, a district court must remain vigilant to ensure that Rule 23(a) prerequisites are present." Culver, v. City of Milwaukee, 1999 U.S.App. LEXIS 26473, at p. 12-13 (7th Cir. 1999) [unpublished opinion], *citing* General Tel. Co. v. Falcon, 457 U.S. 147, 161, 72 L.Ed.2d 740, 102 S.Ct. 2364 (1982), and Toney v. Burris, 881 F.2d 450, 454 (7th Cir. 1989) "(remanding a class action case to the district court 'so that it may consider whether the order certifying the class is still appropriate')."

In this case, it is clear the class representative plaintiff agreed to the settlement and did not appeal it for that reason. Scrutiny of the issues surrounding adequacy of representation in class settlements is to be greater, and not less, than the scrutiny applied to non-settlement class actions. "Such

attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." Amchem, 521 U.S. at 620, 117 S.Ct. at 2248. Consistent with Amchem's requirement that class members be "fairly represented," and not just that an apparently "fair" settlement is reached, courts have heightened the scrutiny they afford to absent class members.

This Court's Amchem decision put the named settling parties on notice of the very real likelihood that the instant settlement did not comply with the statutory requirements of Rule 23(a) and (b)(3) and could be constitutionally challenged by absent or future members. The fractionators proceeded at their own risk with respect to the legality of the settlement and any violation of due process it represented, and absent and future class members cannot be bound by a settlement that did not comport with Rules 23(a) and (b), or that was based on the mandatory self-exclusion notice it generated.

Absent class members are under no duty to intervene in or monitor class proceedings. Epstein v. MCA, Inc. (Epstein II), 126 F.3d 1235, 1243-45 (9th Cir. 1997). However, in granting the anti-suit injunction at issue here, the district court ruled the Seventh Circuit had already rejected any argument that this class settlement is void under Amchem, and did not address the issue of whether petitioners at bar include "absent" and "future" class members As absent and future class members, petitioners submit they had no obligation to opt into or out of a settlement that was improperly certified, and they are entitled to rely on collateral attack if the settlement is used against them. In this context, the law of the case, *res judicata*, and collateral estoppel should not have been utilized to prevent their appeal of the anti-suit injunctions from raising a collateral attack on the constitutional violations of the settlement-only class certification.

The Seventh Circuit's decision constitutes to a

holding that absent class members must intervene to protect themselves in the class certification proceedings in order to exhaust appellate remedies, which unconstitutionally deprives them of the due process available to them under Rule 23 and for collaterally attacking an injunction based on an improperly certified settlement-only class. The instant petition should be granted by this Court to ensure that a class member's absence is not treated as tantamount to default, waiver or consent.

Petitioners now turn to an examination of the settlement under the lens of Rule 23.

II. The Settling Class Plaintiff and Counsel in the Case at Bar Did Not Meet Their Substantive Obligation of Adequate Representation When They Failed to Support the Propriety of Certification under the Rule 23(b)(3) Prerequisites of Predominance and Superiority, Which, It Is Respectfully Submitted, Renders the Provisional and Final Certification of the Class Settlement below an Unauthorized Violation of Due Process and Void as to These State Court Litigants.

In the personal injury products liability context, it is significant that this Court has noted that, while "the text of [Rule 23] does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number," it is nevertheless clear that "the [Advisory] Committee advised that such cases are 'ordinarily not appropriate' for class treatment." Amchem, 521 U.S. at 624-625, 117 S. Ct. at 2250. Yet, "[a]mong current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device." *Id.*, 521 U.S. at 618, 117 S.Ct. at 2247. However, heeding the Advisory Committee advice regarding the 1966 revision of Rule 23 "continues to call for caution when individual stakes are high and disparities among class members great", and

caused this Court to reject class certification that "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.*, 521 U.S. at 624-625, 117 S.Ct. at 2250.

In Amchem, this Court has left no doubt that class actions, whether they are litigation or settlement driven, must meet the prerequisites of Federal Rules of Civil Procedure 23(a) and (b) in order constitutionally to bind absent class members. It is or approaches the axiomatic to state that a properly certified "settlement only" class must satisfy Rule 23(b)(3)'s predominance and superiority requirements./*[5] *Id.*, 521 U.S. at 615, 117 S.Ct. at 2245-2246. The requirements of Rules 23(a) and (b) cannot be waived or ignored just because the end sought is a "fair" settlement. Nor does this end justify the means, that is to say, the fairness or desirability of the settlement does not justify the failure to apply the requirements of Rule 23 (a) and (b)(3) to the settlement class. On its face, subdivision (b)(3) places a burden on the proponents of the "settlement-only" class action to show that common issues predominate over individual issues in the underlying claims, and that the class action is superior to the normal adjudication process. Moreover, failure to adhere to Rule 23 would violate not only the express terms of Rule 23, but also the Rules Enabling Act under which it was promulgated.

A. The petitioners' collateral attack on the settlement-only class certification at bar raises substantive and procedural due process issues that confirm that, like the decertified "litigation" class before it, this settlement class should not have been certified by the district

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[5]*/The settlement-only class at bar would have to meet the prerequisites of subdivision (b)(3) requiring a showing of predominance and superiority, since it involves neither a "limited fund" under (b)(1), nor declaratory or injunctive relief under (b)(2).

court and should have been decertified by the Seventh Circuit, and the anti-suit injunctions dissolved.

In the case at bar, there can be no doubt that a settlement-only class followed closely on the heels of the decertification of a litigation class involving the same members and claims. In point of fact, the district court in the factor concentrate multidistrict litigation had in the past granted partial certification of a litigation class for negligence claims only, which was decertified by the Seventh Circuit. Wadleigh, et al., v. Rhone Poulenc Rorer, Inc., et al., 157 F.R.D. 410, 413 (N.D. Ill, E.D. 1994), *mandamus granted, class cert. rev.*, 51 F.3d 1293, 1297 (7th Cir.), *cert. den.*, 516 U.S. 867 (1995). The decisions involved evince that long before it certified the settlement-only class at issue here, the MDL district court had recognized the need to fulfill the requirements of Rules 23(a) and (b) in the certification process. In this regard, it stated in Wadleigh that:

> In addition to fulfilling the prerequisites of Rule 23(a), plaintiffs must satisfy the requirements of Rule 23(b)(3) that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> The court's finding that there are common questions of law and fact sufficient to meet the requirement of Rule 23(a)(2) is not the same thing as a finding that those questions predominate over those that affect only individual members of the class.

Wadleigh, *supra*, 157 F.R.D. at 418. It cannot be gainsaid

that in Wadleigh, the district court previously reached the conclusion individual questions in this factor concentrate litigation clearly predominated over the common questions based on what he considered to be sufficient evidentiary support for that conclusion. His lengthy opinion on the subject did not indicate that he had reached this conclusion lightly. Yet, despite these prior rulings, there was no showing by the settling parties below as to how the individual questions that "clearly predominate" in the litigation context suddenly did not pose a barrier to meeting the predominance requirement in the settlement-only context. Moreover, it is significant that the district court itself rejected the notion that predominance can be shown by the proponents of the factor concentrate class action at bar, as evinced by its prior ruling that:

> On the proximate cause issue in the case against the fractionators, then, **individual questions involving the particular circumstances of each plaintiff, and often the law peculiar to different jurisdictions, will clearly predominate**. The only common question might be the issue of possible aggravation from multiple exposures.

Id., 157 F.R.D. at 422 [emphasis added]. Indeed, this predominance of individual issues caused the district court to limit the proposed litigation class to negligence liability, and, on appeal, the Seventh Circuit appears to have agreed, stating in its subsequent mandamus decision that:

> The district judge did not think it feasible to certify Wadleigh as a class action for the adjudication of the entire controversy between the plaintiffs and the defendants. Fed.R.Civ.P. 23(b)(3). The differences in the date of infection alone of the thousands of

> potential class members would make such a procedure infeasible. Hemophiliacs infected before anyone knew about the contamination of blood solids by HIV could not rely on the second theory of liability, while hemophiliacs infected after the blood supply became safe (not perfectly safe, but nearly so) probably were not infected by any of the defendants' products.

Matter of Rhone-Polenc Rorer, Inc., 51 F.3d 1293, 1296-1297 (7th Cir.), *cert. den.*, 516 U.S. 867, 116 S. Ct. 184 (1995).

The aforesaid mandamus decision occurred upon the defendant fractionators' petition to decertify the negligence litigation-class the district court had crafted, and resulted in successfully reversing the partial class certification because the Seventh Circuit ruled class treatment was not appropriate under Rule 23. *Id.* On the issue of superiority, it appears dispositive that the Seventh Circuit expressly ruled in the prior decision decertifying the litigation class that:

> We know that an approach similar to that proposed by Judge Grady has been approved by asbestos litigation. ...Most federal courts, however, refuse to permit the use of the class-action device in mass-tort cases, even asbestos cases. ...The number of asbestos cases was so great as to exert well-nigh irresistible pressure to bend the normal rules. **No comparable pressure is exerted by the HIV-hemophila litigation. That litigation can be handled in the normal way without undue inconvenience to the parties or to the state or federal courts.**

Matter of Rhone-Polenc Rorer, Inc., *supra*, 51 F.3d at 1304

[emphasis added]. The Seventh Circuit also noted that "class action treatment...has been denied in all the other hemophiliac HIV suits in which class certification has been sought".... *Id.*, 51 F.3d at 1298. Thus, the prior rulings of the district court in granting partial certification and the Seventh Circuit in decertifying the litigation class confirm the subsequent settlement-only class would not and did not, from its inception, qualify under Rule 23(b)(3).

There is no reason to believe the predominance and superiority factors were obviated or met by the simple expedient of adopting a settlement-only posture in the months after the litigation class was decertified. However, as events would have it, on August 13, 1996, a "Factor Concentrate Litigation Settlement Agreement" was finalized and a complaint and motion for certification of a settlement-only class were filed in the MDL court the same day under the caption Susan Walker v. Bayer Corporation, et al., No. 96-C-5024 (N.D.Ill.E.D.), and the next day, August 14, 1996, the district court granted the motion, preliminarily approved the settlement agreement and authorized dissemination of notice of the settlement to the class members defined in the agreement. App. 69a-77a It cannot be doubted that the only difference between the prior decertified class and this new class was that the latter has its basis in a settlement. App. 64a-65a.

The district court's final order approving the settlement did not mention which subdivision of Rule 23(b) ("Class Actions Maintainable") was applicable, nor did the same address the factors set forth in subdivision (a) ("Prerequisites to a Class Action"). Instead, the court referenced its prior order provisionally approving the settlement class the day after the complaint and certification motion were filed in August 1996, and the fact that "[o]n November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement", at which it "considered the objections of persons opposed to the settlement and finds nothing in the objections to justify

rejection of the settlement." App. 40a. After considering and rejecting the various objections, the court made a conclusory ruling that " the Settlement Agreement among the parties is fair and reasonable for the Settlement Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure." App. 49a. Pertinent to this appeal, the district court found and ordered that "all members of the Settlement Class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants" and "are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants." App. 49a.

In Amchem, this Court unanimously and unequivocally held a "settlement only" class is not immune from the strictures of Rule 23, and in fact may be subject to closer Rule 23 scrutiny than a class certified for litigation purposes. Indeed, it is accepted jurisprudence that:

> In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

In re Northern Dist. Calif., Dalkon Shield IUD Products Liability Litig., 693 F.2d 847, 853 (9th Cir. 1982), cert. den., 459 U.S. 1171 (1983) ("commonality begins to be obscured by individual case histories", *id.*, 693 F.2d at 854. With

respect to the issue of commonality under Rule 23(a)(2), "there is an important check on this requirement under Rule 23(b)(3)." In re: American Medical Systems, Inc.; Pfizer, Inc., *supra*, 75 F.3d at 1080./*[6]

It is most revealing that the Final Order and Judgment certifying the settlement class in the case at bar does not mention the Rule 23(a) or (b) prerequisites, either expressly or by implication, with the possible exception of touching on the adequacy of counsel issue.*/[7] Petitioners submit that the absence of any specific findings under Rule 23(a) or (b) is conspicuous in the case at bar in light of the existence of prior decisions certifying and then decertifying a partial litigation class action, and makes it unclear whether the prior decisions were implicitly overturned, or at least not considered relevant, when the settlement class involving the same membership was later certified. Thus, it appears,

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[6]/*In this regard, it is pertinent that in considering "The Strength of Plaintiffs' Case on Merits," the district court flatly acknowledged, *inter alia*, that:

> **Most class members** are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.)

App. 42a [emphasis added] . These findings indicate the settlement was approved despite the absence of any sub-classes of claimants, in particular differentiating cases in which the statute of limitations had not yet expired, or the exposure took place when the fractionators can be deemed to be on notice of the defect.

[7]*/In this regard, the district court focused on the competence of counsel, stating he was "fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval." App. 45a.

despite the Seventh Circuit's decision in Rhone-Polenc, *supra*, ruling that no litigation class could be certified, that the district court turned around and certified a settlement class just as sweeping in its reach, apparently with the idea that the rigors of Rule 23(a) and (b) could be relaxed in the settlement-only context. It is telling indeed that the fractionators fought certification of a litigation class, but embraced a settlement class.

B. The self-exclusion provisions of Rule 23(c)(2) were not properly invoked to bind class members because the settlement-only class could not, in the first instance, be maintained under Rule 23(b)(3).

It is respectfully submitted that the uniformity of $100,000-per-claimant settlement payment in the case at bar strongly implicates a compromise in which the average value of weak and strong cases were blended in a kind of melting pot valuation, rather than through an examination of the Rule 23 (b)(3) criteria.. It is clear the Seventh Circuit's use of the adjectives "downright weird" and "questionable" are direct references to the fact that the settlement calls for an identical $100,000 payment to each class member who opts in and qualifies by presenting adequate proof. There are four defendant corporations involved, and $100,000, while clearly not "paltry",/*[8] is not particularly generous compensation for exposure to and the transmission of the HIV virus that causes AIDS. Under the settlement terms, the criteria for payment of $100,000 boil down to two central facts: (1) a hemophiliac's exposure to Factor VIII or IX concentrate, and (2) a positive HIV test. Thus, it becomes clear this broad definition and identical payment are the result of compromise that takes into consideration differences in the strengths and weaknesses of each class member's litigation potential,

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[8]*/Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

including such things as expired statutes of limitations and proof of other HIV-related sources (such as drug use) that affect the value of an individual case.

While the monetary terms of the settlement are enough to call into question the adequacy of representation, there is more. The class action was cast as an encompassing opt-out settlement barring present and future litigation. It also contained a forfeiture clause, under which both the right to the $100,000 payment ***and*** the right to sue the defendants were lost if a person who fit the class definition (even if they did not get actual notice, or did not know they were exposed or were HIV-positive) failed to opt in or out of the settlement within the 45-day notice period./*[9] This sudden-death settlement term violated Rule 23(c)(2). The violation of due process took form in the settlement-only class at issue, namely, the do-nothing forfeiture clause was incorporated into the settlement terms. Thus, the settlement by its own terms and the notice to putative class members based thereon

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[9]*/The notice, *inter alia*, advises, "If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class." However, antithetical to the inclusive nature of class actions, the Legal Notice includes what can only be characterized as a forfeiture clause, to wit:

> **D.Failure to File the Confidential Claim and Exclusion Forms:** If you are a member of the Settlement Class described in this Notice, and you "do nothing" - in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class - you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also close the right to pursue an individual lawsuit against these Fractionators.

sought both to utilize and violate Rule 23(c)(2) at the same time, inasmuch as the notice the rule permits must advise each member not only of the deadline for self-exclusion, but also that "the judgment, whether favorable or not, will ***include*** all members who do not request exclusion". Rule 23(c)(2)(B) [emphasis added]. A self-exclusion-by-opt-out clause that results in *exclusion from the settlement* calls into question the adequacy of representation. Notice is also questionable, because a class member is one who must have an HIV-positive test result, which may not have been available to many hemophiliacs during the 45-day notice period, and thus the class included persons who had only potential or future class claims yet were bound by the settlement if they failed to opt in or out.

The Amchem settlement likewise stemmed from "an agreement purporting to bind potential plaintiffs", and the agreement "launched this case, exclusively involving persons outside the MDL Panel's province--plaintiffs without already pending lawsuits." Amchem, 521 U.S. at 601, 117 S.Ct. at 2239. In the case, "as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15." Amchem, 521 U.S. at 605, 117 S.Ct. at 2241. The factor concentrate settlement agreement at issue here differs from Amchem only in that it sought to bind all federal and state court pending litigants as well as future litigants.

Having failed to meet their burden to show predominance and superiority in the first instance, the settling parties went on to violate due process by utilizing a self-exclusion opt-out class notice under Rule 23(c)(2) that was constitutionally flawed in form and substance. The text of the rule makes clear that, whether a litigation or settlement-only class is proposed, the opt-out mechanism can only be used if the class can be properly certified under one of the

subdivisions of Rule 23(b) before the exclusion device in Rule 23(c)(2) procedure can serve as notice binding absent members to the proposed class. The use of the self-exclusion mechanism to cut off the rights of absent and future parties is expressly contingent upon a proper (b)(3) certification, which never occurred here.

Moreover, in agreeing to the sudden-death provisions, the settlement-only class representatives agreed to cut off the right to compensation of "do nothing" class members, including these peititioners, who might simply not learn of the settlement through indirect notice in the media advertisements during the option period. Assuming, *arguendo*, that an encompassing opt-out class could be properly certified, the class representatives clearly failed properly to notify and to preserve the right of class members who did not opt out by the deadline to nevertheless be entitled to payment by virtue of inclusion under Rule 23(c)(2)(B), or, to preserve their right to sue if no payment was offered or accepted.

Even if the Seventh Circuit were to conclude this settlement-only class passes muster under Rules 23(a) and (b), the "do nothing" forfeiture clause exceeds the bounds of the express language of Rule 23(c)(2), and is void, and thus violates the Rules Enabling Act, 28 U.S.C. § 2072. The "do nothing" exclusion provision of the settlement gave the settling parties a mechanism to quickly cut off the rights of all proposed class members, without addressing the adequacy of notice, or whether personal notice, at a minimum, was required to be given to each hemophiliac before cutting off his or her rights,/*[10] and clearly undermines the settlement's

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[10]*/The proposed class defined in the settlement documents encompasses the entire population of an estimated 20,000 hemophiliacs infected by factor concentrates (*see* Wadleigh, *supra*, 157 F.R.D. at 414), their families and their estates. Thus, unlike the millions of asbestos victims, the number of class members may have required more direct notice. Even if HIV-confidentiality laws made identification of individuals difficult or impossible, those obstacles to giving personal notice to this

ability to meet the due process and adequate representation requirements of Rule 23. Those class members who were already litigating or represented by lawyers clearly had an advantage in meeting the notice deadline because they were assured of getting actual notice and in knowing the strength of the evidence and legal obstacles in their individual cases, having developed the same in ongoing litigation.

These petitioners were not adequately represented because, *inter alia*, the predominance and superiority tests were swept under the rug, and the "do nothing" provisions of the settlement agreement and notice work a forfeiture and distort the procedure set forth in Rule 23(c)(2) . *See* Raffel v. Medallion Kitchens of Minnesota, Incorporated, 139 F.3d 1142, 1144-1145 (7th Cir. 1998), *citing,, inter alia*, First Nat'l Bank and Trust Co. of Evanston v. First Nat'l Bank of Skokie, 178 Ill. App. 3d 180, 533 N.E.2d 8, 14, 127 Ill. Dec. 390 (Ill. App. Ct. 1988) ("the law abhors a forfeiture and will not enforce a forfeiture clause in a contract if an injustice would result therefrom").

"The final element a class action must show is that a class action 'is superior to other available methods for the fair and efficient adjudication of the controversy.'" Fisher v. Bristol-Myers Squibb Co., 181 F.R.D. 365, 372 (N.D.Ill., E.D., 1998). On the issue of whether members of the class have a superior interest in individually controlling their own prosecution of their personal injury claims, the court in Fisher noted further that:

> The Third Circuit recently observed that "claims for personal injury and death . . . have a significant impact on the lives of the plaintiffs and [they] frequently receive huge awards in the tort system. Plaintiffs have a

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relatively finite group would militate ***against*** certification rather than allow a mandatory opt-out class with a quick 45-day binding deadline to opt out.

> substantial stake in making individual decisions on whether and when to settle." ...This exact language was quoted with approval by the Supreme Court in Amchem, 117 S.Ct. at 2246. . . .

Fisher, 181 F.R.D. at 372-373. It is respectfully submitted the $100,000 compromise settlement amount reflects there is a substantial stake for the individuals involved here.

On the other hand, the $100,000 payment amount evinces that the settlement-only class was actually certified on the basis of the fairness of the settlement to members who might otherwise be legally barred from litigating against the fractionators, as well as other issues that are not common to the membership, but rather are problems that affect some members of the class and not others. This is not an appropriate result, since, "Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is 'fair,' then certification is proper." Amchem, 521 U.S. at 622, 117 S.Ct. at 2249. This Court warned that, "If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context. Amchem, 521 U.S. at 623, 117 S.Ct. at 2249-2250. That the settlement's "fairness" was substituted for the Rule 23(b) criteria here is revealed in the district court's statement below that: "Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative." App. 47a. However, this Court has explained that:

> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale

> compensation scheme is a matter fit for legislative consideration, ...but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.

Amchem, 521 U.S. at 622-623, 117 U.S. at 2249 [footnote omitted].

CONCLUSION

For the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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